

John A. Shaw  
374 Cromwell Drive  
Rochester, NY, 14610  
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Office of the Secretary  
Federal Communications Commission  
Washington, DC

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RE: Notice of Proposed Rulemaking  
Rules and Regulations Implementing the Telephone Consumer Protection  
Act of 1991  
CG Docket No. 02-278

## **COMMENTS**

### **INTRODUCTION**

I comment as a telephone subscriber only. I have no relationship with any telemarketer, telecommunications business, or user of telemarketing services. I have no particular expertise in telephone business or technology.

I am a resident of New York State and use the New York State Do Not Call list to block telemarketing calls to my home.

### **SUMMARY**

Unwanted telemarketing calls are not just an annoyance to the telephone subscribers but can cause real inconvenience and cost.

I support the creation of a national "Do Not Call List" that will allow telephone users to block marketing telephone calls to their homes because company specific do-not-call lists are not effective in solving the problem of unwanted calls,

Problems in the identification of wireless phone numbers would be solved by allowing the subscriber to place the wireless number on a do-not-call list.

The use of predictive calling with any call abandonment rate should be restricted.

I oppose any preemption of state or local regulations that are not inconsistent with the federal regulations.

I believe that the national "Do Not Call List" should be created by the FCC rather than the FTC because of limits on the jurisdiction of the FTC.

## **THE PROBLEMS OF UNWANTED TELEMARKETING CALLS**

At any time of the day some people are sleeping, due to illness, night work, or other reasons. They cannot simply turn off their telephones due to the need to receive urgent business or personal calls. Telemarketing calls interrupt their sleep. A particular problem exists for people who do not normally sleep during the day but must do to a changing schedule. When a telephone call awakes them they may have difficulty getting back to sleep. The unwanted telephone call can then become more than an annoyance but a disruption in their schedule.

There are a growing number of elderly people, living at home, who are senile, have limited mental capacity, or are easily confused who may become victim of an otherwise legitimate sales call. The current regulations and statues prohibit automatically dialed calls to the patient room of a health care facility or to an elderly home. However, a growing number of such people are living at home.

When a wireless telephone consumer receives a call, the consumer will often have an increased cost greater than the cost of the call to the telemarketer. Further, if the wireless user is driving, the driver should, for safety reasons, or must, due to state law, pull off the road to receive the call, delaying the trip.

### **SPECIFIC COMMENTS**

The following comments are in reply to specific requests for comments in the Notice of Proposed Rulemaking (NPRM) released September 18, 2002 (67 Fed. Reg. at 62667, October 8, 2002), with reference to the NPRM paragraph number.

The Commission requests that submissions regarding the do-not-call list be separate from all other issues. (67 Fed. Reg. at 62669, October 8, 2002). I have divided my comments into two groups, those comments in support of a national do-not-call list and concerning its implementation and those comments not related to a national do-not-call list.

#### ***Comments in Support of and Relating to a National Do-Not-Call list:***

##### **The overall effectiveness of the company-specific do-not-call approach**

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The company-specific approach has several drawbacks that render it almost useless:

- If the subscriber is sleeping or busy the damage is done when the telephone rings. The fact that he can ask to be added to a do-not-call list does not remedy that damage.
- To be placed on a company's do-not-call list a subscriber must first receive a call from the company and request to be placed on the list.

- In order to enforce the regulation the subscriber has to keep records of all telemarketing calls, adding a burden to the consumer. This is a particularly difficult burden when a call wakes up a sleeping person or occurs when the person is extremely busy.
- Some telemarketers hang up before consumers can complete a do-not-call request.
- The elderly and others with limited mental capacity cannot be expected to complete a do-not-call request and keep records of those requests.
- As the telemarketing business grows, there will be so many telemarketers that even one call from each telemarketer is a significant number of calls. Many large businesses keep separate do-not-call lists for each individual business.
- Many families have more than one land line telephone number (a second number for other members of the family, a line intended for internet access but also connected to a phone for occasional use, etc.). With the company specific approach a customer might receive a call on one number, have that number placed on the do-not-call list, and then at another time receive a call from the same company on the other number.
- People often change phone numbers due to moving or to changing telephone companies. Even if they have records of all do-not-call requests they cannot reestablish their do-not-call status unless they have telephone numbers or addresses of each of the companies on whose list they had been listed. They must wait for phone calls from each company in order to place their new number on the do-not-call list.

A national do-not-call list, like the state lists, avoids the problems described above. If telemarketers obey the law, there will be no first calls and no need to keep records of individual do-not-call requests. If a customer who has placed his number(s) on the national or state list receives a call from any non-exempt telemarketer he will know that a violation has occurred and will be able to report it.

### **Established Business Relationships**

¶¶20, 34, 35

The issue of “established business relationships” is one of the most significant, and most difficult, issues concerning a national do-not-call list. Certainly consumers will often expect calls from certain parties with whom they do business. However, the fact that a consumer has once done business with a company should not allow that company to have an unlimited privilege to call the customer. Replying to the questions in a NPRM ¶35, perhaps a customer with a do-not-call request (specific or national) should be allowed to receive calls from a newspaper or a credit card company concerning expiration of the subscription or credit card. However, that privilege should not extend to allow someone who places a classified ad to receive subscription solicitations or allow someone with a

credit card to receive solicitations for other business from the credit card company or bank.

The definition of “established business relationships” should be modified (both for a do-not-call list and for existing regulations) to include the following limitations:

- A company that has a relationship with a customer for one service or product may not use that relationship to market a different service or product.
- The addition of a subscriber’s number to a company or national do-not-call list should end any “established business relationship” for the purpose of telemarketing calls, even though the business relationship for other purposes is not ended. For example, a customer may, at one time, accept calls from his credit card company. He then decides that he is tired of receiving sales calls and places his number on a do-not-call list. Even though he still uses his credit card this use should not constitute a business relationship that would terminate the do-not-call request.
- Certain actions of a consumer, such as calling a business or making a purchase from a business, does not establish a business relationship when that customer’s number is on a do-not-call list.

## **Network Technologies**

### **¶21**

A technology that requires telemarketers to use a specific type of telephone number (specific area code or transmission of a specific code with the caller ID, for example) that would cause the call to be blocked for subscribers who request such blocking might be acceptable if such service was available at no cost to the subscriber. Such technology could be considered the equivalent of a do-not-call list.

Any use of such technology should not, however, block calls from any source other than telemarketers. For example, many subscribers can block calls from callers who have blocked caller ID. However, subscribers who receive business calls at home or who have children away from home must be prepared for emergency calls from almost any phone, and will not want to block any calls that may be an important business call or an emergency call from a child. Therefore the blocking of calls without caller ID or the blocking of calls from unknown phone numbers is not an option for most subscribers and is not a substitute for a do-not-call list.

## **Wireless Telephones**

### **¶41 *et. seq.***

Wireless (cellular) telephones present particular problems regarding unsolicited phone calls:

- The receiver of the call bears at least some cost, in many cases. Even though, as the Commission notes (NPRM ¶42), many wireless consumers are purchasing larger “buckets” of minutes at a fixed rate, as they do so they also use more minutes each month. Therefore, any additional phone call will often result in an additional charge for that month.
- Both the consumer’s interest in automotive safety and the laws in some states prohibit the use of wireless phones while driving. Often, when the driver receives a call he will then have to pull off the road before answering the call. If he cannot answer in time, the driver will, not knowing that the call is from a telemarketer, return the call using the function in most cellular phones to call back to the caller ID. This further delays the driver and adds to the wireless phone bill. If the driver is not sufficiently concerned with the safety and is not driving in an area where such calls are prohibited, calls to wireless telephone may present a safety issue.

For these reasons telemarketing calls to wireless telephones should be prohibited.

The Commission asks, in ¶45, if calls to wireless phones that are not charged to the consumer should be exempted from the rules. Because the phone may be in the possession of an automobile driver and with the inconvenience and safety issues for phones used by drivers there should be no such exemption.

As the Commission correctly notes in ¶46, new developments such as the ability to port numbers from wire line phones to wireless phones and the assignment of wireless numbers from a pool rather than from a full central office code may make the identification of wireless numbers impossible for a telemarketer.

The use of a national do-not-call list will allow the subscriber to place the wireless number on the list, eliminating the problems the telemarketer may have in identifying wireless numbers.

### **National Do-Not-Call List**

¶49 *et. seq.*

As I explain in several of the detailed comments above, the Commission should establish a national do-not-call list.

The Commission should coordinate its activities in this regard with the work of the FTC. In my opinion the FCC should be the agency that adopts and maintains a do-not-call list as well as adopting other telemarketing rules except those directly relating to fraudulent business practices. The FTC is limited by its lack of jurisdiction over certain industries, including the banking industry.

The requirements imposed on the FCC by 47 U. S. C. §227(c)(3)(A-L) but not imposed on the FTC should not deter the FCC from adopting a national Do-Not-Call list or from requiring entities under the Commission’s jurisdiction to comply with FTC regulations. (see NPRM ¶53)

## ***Comments on Issues other than a Do-Not-Call list:***

### **Predictive Dialers**

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Abandoned calls made by predictive dialers present special problems because:

- As explained above, the most annoying part of a call is when the ringing phone disturbs sleep or other activity, the abandoned call presents almost the same problem to the subscriber as does the call not abandoned.
- the subscriber has no way of knowing whether he received an abandoned telemarketing call, a nuisance or harassing call, or a misdialed number. This adds to the frustration of being woken up or interrupted only to hear dead air.
- The subscriber has no way of asking to be removed from the company's call list, reporting violations of company, state, or (if adopted) or federal do-not-call lists.

For these reasons, the regulations should:

- Define a phone call to be received when the subscriber's phone rings, not when the two parties begin talking, and
- Require that abandoned calls provide the same identification of the caller as required for calls not abandoned.

Otherwise the regulations should forbid the use of predictive dialers or require a zero abandonment rate.

### **Prior Express Invitation or Permission for Fax Solicitations**

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Specifically addressing the Commission's invitation to comment on the issue of publication of a fax number in an organization's membership directory, I believe that such publication does not represent prior express invitation any more than the listing of a phone number in the telephone directory white pages represents an express invitation or permission for telephone solicitation calls.

Furthermore, the publication of the fax number or telephone number by an officer or member of the leadership of an organization is not a prior express invitation or permission for any communications other than communications relevant to that individual's leadership position.

Because telemarketers may attempt to argue otherwise these restrictions should be stated explicitly in the regulations.

## **Time of day restrictions**

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8:00 am is too early in the morning to allow telemarketing calls to begin. While most, but not all, people are awake at that time, they are usually busy getting ready to leave for work or getting children ready for school. Phone calls received at that time are frequently urgent calls relating to transportation to work or school, calls from school about forgotten homework, etc.

Because of evening work schedules some people are not yet awake at 8:00 am.

I suggest a starting time of 9:00 am. This is a compromise position. Due to the number of nighttime workers, at any time of the day there will be people in bed.

As to the FTC concern about a conflict between their TSR and the FCC regulations, the times should be the same, or either the FCC or FTC, but not both, should provide time of day restrictions.

Even if a national do-not-call list is established the time of day restrictions should be kept.

## **Fax Broadcasters**

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The Commission should amend the rules to explicitly state that certain practices, such as the use of telephone numbers provided by the fax broadcaster, will expose the fax broadcaster to liability under the TCPA and the Commission's rules just as if the fax broadcaster were an advertiser. The rules should explicitly state that in order to be protected by the common carrier exemption the fax broadcaster may only send to a list of numbers that were provided by the advertiser, and for which the broadcaster received a certification from the advertiser of express consent for each number.

## **CONCLUSION**

I thank the Commission for the opportunity to be heard on these issues and urge the adoption by the Commission of a national do-not-call list.

Respectfully submitted,

John A. Shaw